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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 316

THE MAY DEPARTMENT STORES COMPANY, A CORPORATION, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R–Supp. 6–11)[1] is reported at 162 F. 2d 247. The findings of

[1] The printed record for purposes of the petition for a writ of certiorari consists of one volume into which have been bound the printed "Record" in the court below which contains the pleadings and the decision and order of the Board (marked "1"), referred to herein as "R–1."; the printed "Portions of Record Printed as an Appendix to Brief of Respondent" in the court below (marked "2"), referred to herein as "R–2."; the printed "Portions of Record Printed as an Appendix to Brief of Petitioner", being the

fact, conclusions of law, and order of the National Labor Relations Board (R–1. 46–85) are reported at 70 N. L. R. B. 94.

JURISDICTION

The decree of the court below was entered on August 4, 1947 (R–Supp. 29–32). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

Whether there is substantial evidence to support the findings of the Board that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the National Labor Relations Act, and discriminated in regard to the hire and tenure of employment of one employee in violation of Section 8 (3) of that Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 16–17.

STATEMENT

Upon the usual proceedings, the Board, on August 19, 1946, issued its findings of fact, con-

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appendix filed by the Board in the court below (marked "3"), referred to herein as "R–3."; and the proceedings in the court below (not designated by number), referred to herein as "R–Supp."

clusions of law, and order (R–1. 46–84). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:

In 1943 the Elevator Operators and Starters, Local 50E, affiliated with Building Service Employees International Union, affiliated with the American Federation of Labor, hereinafter called the Union, began to solicit members among the Company's elevator service employees (R–1. 55; R–2. 2, 4). On January 28, 1944, on petitions filed by the Union and the C. I. O., the Board conducted an election among the elevator service employees to determine their choice of bargaining representative (R–1. 56; 54 N. L. R. B. 230; 61 N. L. R. B. 258). A majority of the employees voted against representation by any union (R–1. 56; 61 N. L. R. B. 258). The Board thereafter set aside this election because the Company interfered with the employees' freedom of choice (R–1. 56; 61 N. L. R. B. 258). On May 21 and 22, 1945, a second election was conducted among these employees (R–1. 56; 62 N. L. R. B. 1256). A majority of the employees participating in this election voted in favor of representation but neither of the labor organizations obtained a majority vote (R–1. 56; 62 N. L. R. B. 1256). The Board accordingly directed a third election (R–1. 56; 62 N. L. R. B. 1256). Before this election could be held, the Company engaged in various anti-union activities, including the discharge on July 7, 1945,

of Marie Lee, the employee who had appeared in November 1944 in the representation proceeding as a witness on behalf of the Union and had served as an observer for the Union in both the election of January 1944 and the election of May 1945 (R–1. 56, 62, 71; R–2. 3, 6, 7, 24–25, 34, 123, 147, 153). The Board therefore postponed conduct of this election and it had not yet been conducted at the time of the hearing in this case (R–1. 56).

Marie Lee had been employed by the Company as an elevator operator for 16 years at the time of her discharge on July 7, 1945 (R–1. 71; R–2. 3). When the Union began its organizing campaign in 1943, she took a very active part (R–1. 71; R–2. 4, 34). She solicited members and succeeded in securing 30 to 40 signed membership cards from among the approximately 55 employees in the elevator operator service (R–1. 71; R–2. 6). She was the only elevator employee to wear a union button (R–1. 71; R–2. 33, 123). She continued to campaign on behalf of the Union after the first election in January 1944 (R–1. 71; R–2. 7).

For more than a year and a half preceding her discharge Lee had been the target of numerous anti-union statements made by her superior, Mrs. Winfield, supervisor of the elevator service unit (R–1. 56–57; R–2. 3–4, 116, 123). Approximately a month and a half before the election in January 1944, Mrs. Winfield warned Lee that she "was

going to keep on fooling around with the union" until she would be fired (R–1. 57; R–2. 5). Subsequently, on May 25, 1945, three days after the second election, in which Lee had acted as observer for the Union, Mrs. Winfield lectured Lee for some forty-five minutes during working hours. She told Lee that the latter owed her continued employment to Mrs. Winfield, that Mrs. Winfield "knew enough" to have her discharged but that the Company could not "pay" her enough to "sell out" her own people,[2] and that she thought Lee was "more intelligent than that" (R–1. 58; R–2. 8, 9, 70–71). In the same conversation, Mrs. Winfield also complained to Lee that she, Mrs. Winfield, "couldn't handle" Alma Johnson, another elevator operator, since Johnson had, at Lee's instigation, acted as observer for the Union in the second election (R–1. 58, 59; R–2. 9–10). Mrs. Winfield asked Lee to tell Johnson that she, Mrs. Winfield, was her supervisor and not Lee (R–1. 58, 59; R–2. 10).

A day or two after the second election, at the regular morning assembly where the elevator operators were gathered for inspection by their supervisor and for special instructions and assignments (R–1. 57, n. 6; R–3. 6–7), Mrs. Winfield told her whole group of subordinates that the previous evening she had heard a speech by a colored man who had attended the United Nations

[2] All employees in the elevator service unit, including Lee and Winfield, were colored (R–1. 57, n. 7; R–2. 37–38).

Conference at San Francisco. She stated that this speaker had said that colored people were too easily misled and that unions were not good for colored people and "did not do colored people any good at all and we should let them alone" (R–1. 57, 59; R–2. 11–12).

On July 7, 1945, Superintendent of Employment McCarthy summoned Lee to his office and told her that he was discharging her because she had been insubordinate, disobedient and had violated store rules (R–1. 71; R–2. 24–25, 152, 156). He directed her to turn in her uniform and collect her salary check (R–1. 71; R–2. 25). Several days subsequent to Lee's discharge, at the direction of counsel for the Company, each of the elevator operators was called to the Company's executive office and questioned to determine whether Lee had in fact been disrespectful to her superiors and whether she had solicited while at work (R–1. 62–64; R–2. 153–154, 165). On July 31, 1945, Lee sent McCarthy a letter asking for a "complete and detailed statement of the reasons for my discharge" (R–1. 71; R–2. 32, 177). McCarthy replied: "You were discharged * * * for insubordination, disobedience, and repeatedly violating store rules" (R–1. 71–72; R–2. 26–27, 176–177). On August 7, Lee again wrote McCarthy, noting that "the statement submitted by you is vague in that it does not state which store rules, if any, the company alleged were violated by me"; once more she requested a "more specific statement" of the reasons for the discharge

and of the rules she allegedly violated (R–1. 72; R–2. 32–33, 177–178).[3] She received no reply (R–1. 72; R–2. 33).

At the hearing in this proceeding, McCarthy testified that he decided to discharge Lee because of reports that she had engaged in union solicitation during working hours in violation of store rules and because of adverse criticism by her supervisor of her conduct as an employee (R–1. 72; R–2. 148–150). He testified that the first report he received concerning any shortcomings of Lee was that of elevator starter Nolan who on July 3, 1945, informed him that some of the operators had complained to her that Lee had solicited them to join the Union while they were on duty in the store (R–1. 72; R–2. 148, 157). McCarthy further testified that he thereupon interviewed four operators who told him that Lee had solicited them at their elevators, or on her elevator, or in the store building (R–1. 72; R–2. 148–149, 157). Lee denied that she had solicited for the Union during working hours, or in any part of the store other than the locker room (R–1. 72; R–2. 6, 7, 44, 57, 76, 82–83). The operators who were alleged to have complained of her activities during working hours did not testify nor was their failure to testify explained (R.–1. 72). Nor was there

[3] The contrast in literacy between these communications and the oral testimony given by Lee is explained by the fact that she received help in composing the letters (R–2. 40–41).

any evidence that any starter observed Lee engaging in solicitation (R–1. 72). The Board pointed out that in view of the fact that "Operators were not allowed to ride in the regular passenger elevators but were required to use special employee elevators * * * and the manifest difficulty for operators to engage in conversation while taking cars from floor to floor under the supervision of starters," it credited Lee's denial of the charge of solicitation during working hours (R–1. 72–73; R–2. 21, 43–44, 57, R–3. 16).[4]

McCarthy also testified that after he had "pretty much in mind" to suspend Lee for violating the Company's no-solicitation rule, he spoke to Mrs. Winfield about Lee and received from her adverse reports concerning Lee's work and a recommendation that she be discharged (R–1. 73; R–2. 149–150). Thereafter, on July 6, the day before the discharge, McCarthy consulted Mrs. Davis, who acted as supervisor in the absence of Winfield (R–1. 61, 75, 76, n. 30; R–2. 3, 22–23, 150–151, R–3. 6–7, 11, 12–13, 14–15, 19). Mrs. Davis told McCarthy that Lee had not only been disrespectful and insubordinate toward Win-

[4] As the Board pointed out (R–1. 72, n. 29), in an earlier case it had determined that the Company's no-solicitation rule, insofar as it applied to solicitation off the selling floor on the employees' own time was an improper interference with legitimate union activities. *Matter of May Department Stores Co.*, 59 N. L. R. B. 976, 981, enforced, *National Labor Relations Board* v. *May Department Stores Company*, 154 F. 2d 533, 536–537 (C. C. A. 8), certiorari denied, 329 U. S. 725.

field but that, on two occasions, she had also defied Davis' authority (R–1. 75; R–2. 150–152). The alleged incidents took place in May or June 1945. None of them had been reported to McCarthy or the personnel Office until McCarthy asked for information respecting Lee just before her discharge, although Mrs. Winfield testified that it was her practice to submit reports to the Personnel Office "if an operator is disrespectful or insubordinate, or doing something she should not" (R–1. 73–75, 77; R–2. 103, 138, 143). Lee testified that she had not been disrespectful toward her two superiors (R–1. 74; R–2. 56–60). She denied all of the incidents of insubordination attributed to her by Mrs. Winfield and Mrs. Davis (R–1. 74–75; R–2. 9–10, 57–59, 69). With respect to the reports which these two supervisors gave McCarthy the Board found that "their specific charges had little foundation in fact. They did have adverse opinions of Mrs. Lee's work, but it is clear that they had either created or magnified certain incidents to substantiate their subjective evaluations. Furthermore, the findings here demonstrate that Mrs. Winfield had a strong anti-union animus. Mrs. Davis also had indicated her disapproval of the Union * * * these adverse reports concerning Mrs. Lee's work were actuated by anti-union feeling" (R–1. 76). The Board concluded that McCarthy would not have discharged an employee who had given sixteen years of satis-

factory service on so one-sided and unfair an investigation had he not desired to rid himself of an active union adherent (R–1. 76–78).

On the basis of the foregoing facts, the Board concluded that by the anti-union statements of Mrs. Winfield the Company violated Section 8 (1) of the Act (R–1. 47, 56–59) and by its discharge of Lee the Company violated Section 8 (3) of the Act (R–1. 47, 78). Its order directed the Company to cease and desist from its unfair labor practices, to reinstate Lee with back pay and to post appropriate notices (R–1. 50–52).

On December 6, 1946, the Board filed in the court below a petition for enforcement of its order (R–1. 85–90). On June 20, 1947, the court handed down its opinion (R–Supp. 6–11) and on August 4, 1947, entered its decree enforcing the Board's order in full (R–Supp. 29–32).

ARGUMENT

Petitioner's contention (Pet. 15–49) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement, *supra*, pp. 2–9, affords full support for the challenged findings. Petitioner, however, argues that the Court should review the case because the court below by one sentence in its opinion disclosed that it had followed an improper standard of

judicial review (Pet. 5, 6, 7–9, 13, 15–19, 48–49). The opinion of the court below when read in full, however, shows that the court followed the proper standard of review. Thus the opinion states that the hearing before the Board "was largely a contest in veracity between" Lee and Mrs. Winfield (R–Supp. 8). The opinion then sets forth accurately the contention urged by petitioner below and again before this Court (Pet. 5, 8, 13, 14, 21–23, 25, 46, 48, 49), that "Lee's testimony, because of inconsistencies, self-contradictions and improbabilities, did not rise to the dignity of substantial evidence, and that the Court should now rule, as a matter of law, that the Board was precluded from basing any findings upon her testimony" (R–Supp. 8–9). Then the opinion summarizes, first Lee's testimony, then Mrs. Winfield's (R–Supp. 9–10) and concludes that it was properly the Board's function to decide which witness to believe (R–Supp. 10–11). The court adds that "Whatever mistakes the Board may make in appraising the credibility of witnesses and the weight of evidence, and in drawing inferences from conflicting or circumstantial evidence or errors of fact which, like similar errors committed by a jury, are not subject to correction or review" (R–Supp. 11). This we believe is a correct statement of the standard of review here applicable.

Petitioner's assumption that the court below did not consider the record as a whole in deter-

mining whether Lee's testimony was entitled to be considered by the Board as evidence (Pet. 7, 8, 13, 14, 17–19, 48), is belied by the court's summary of the countervailing testimony in the record (R–Supp. 9–10). The opinion makes it clear that the court below looked at the record as a whole in deciding the case. No different standard is imposed by the other statutes which petitioner cites, the Administrative Procedure Act and the Labor-Management Relations Act, 1947 (Pet. 8, 9, 16, 17, 18, 19, 48). The court below in numerous decisions has stated the standard of review which it applies in reviewing Board orders in a manner which shows it was following the standard made explicit by the Administrative Procedure Act and the Labor-Management Relations Act, 1947. Thus in *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16, the court below stated:

> It is undoubtedly true that a Board which with "studied design" ignores all the evidence adduced by the employer and views as truthful only the testimony of adverse witnesses, *acts arbitrarily* and not in accord with legal requirements. * * * And Section 10 (e) of the Act, 49 Stat. 453, 29 U. S. C. A., Sec. 160 (e), which provides that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," *does not, of course, compel the courts* to accept findings reached

> by accepting evidence presented by one side to the controversy *with total disregard for other worthy evidence* before the Board. *N. L. R. B.* v. *Union Pacific Stages, supra.* [Italics supplied.]

To the same effect, see *National Labor Relations Board* v. *Winona Textile Mills,* 160 F. 2d 201, 208 (C. C. A. 8); *Cupples Co. Mfrs.* v. *National Labor Relations Board,* 106 F. 2d 100, 105 (C. C. A. 8).

The decision of the court below clearly followed the same rule of review as has been stated by this Court and the other circuit courts of appeal in the cases which petitioner relies on as presenting a conflict (Pet. 7–8, 15–16, 18, 20, 23–24, 48).

Nor does the Board's decision in the instant case rest as exclusively on Lee's uncorroborated testimony as petitioner states (Pet. 5, 7, 8, 13, 14, 21). The Board found corroboration in McCarthy's own account of his one-sided and belated investigation into the grounds he assigned for Lee's discharge (R–1. 76–78). It found corroboration in the manner in which Mrs. Winfield and Mrs. Davis resurrected, after McCarthy began to look for reasons to discharge Lee, stale charges of insubordination so trivial in character that they had not even been reported according to the usual routine at the time they occurred (R–1. 74–78). The Board also pointed out that the findings in two earlier cases in which it

found the Company guilty of unfair labor practices and in which the courts enforced its orders[5] "tend to corroborate the findings in the instant case, especially as to the credit to be given McCarthy's testimony and the [Company's] motives in taking certain action" (R–1. 79, n. 33).

Furthermore, a reading of Lee's testimony in full shows that the Board was by no means arbitrary in crediting Lee. The trial examiner, who observed Lee and heard her testify, made a careful analysis of the witness and her testimony and concluded that any inconsistencies in her testimony "were due primarily to her failure to understand certain questions" (R–1. 59, n. 10). He found further that "Lee's testimony * * * was truthful and consistent with the factual background herein" (R–1. 59, n. 10). Although petitioner goes to great length in its petition (Pet. 25–46) to show that this finding was unwarranted, the portions of the testimony upon which it relies, when read in proper context, merely substantiate the trial examiner's evaluation of Lee as a witness. For instance, the portion of the record quoted in the petition at pages 25–26 when read with the immediately preceding testimony (R–2. 4) shows that Lee's so-called contradictory an-

[5] *Matter of May Department Stores Co.*, 53 N. L. R. B. 1366, enforced 146 F. 2d 66 (C. C. A. 8), affirmed, 326 U. S. 376; *Matter of May Department Stores Co.*, 59 N. L. R. B. 976, enforced 154 F. 2d 533 (C. C. A. 8), certiorari denied, 329 U. S. 725.

swers were not in fact such. In other instances Company's counsel confused the witness with misleading questions (see, e. g., R–2. 63–66). In all, Lee's testimony, given for an entire day and covering 171 pages of the transcript, stands virtually unshaken as to all material facts, despite the Company's efforts to confuse and harass her by harping on minor details (see, e. g., R–2. 39–41, 81–82), questioning her about apparent derelictions which the Company never sought to establish as part of its own case (see, e. g., R–2. 42, 43–44, 59–60, 61–63, 79), and seeking to distort her earlier testimony (see, e. g., R–2. 48, 60–61, 80).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER, 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *
>
> SEC. 10.
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

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